No. 00-1072

Supreme Court, U.S
FILED
NOV 29 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RECEIVED
DEC 07 2001
LDC

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

ERIC SCHNAPPER*
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

ELAINE CHARLSON BREDEHOFT
CHARLSON BREDEHOFT, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, VA 20190
(703) 318-6800

KRISTINE H. SMITH
EDMUNDS & WILLIAMS, P.C.
800 Main Street
Suite 400
Post Office Box 958
Lynchburg, VA 24505
(804) 846-9000

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 pp

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. 29 C.F.R. § 1601.12(b) IS VALID	1
II. THE CONTENTS OF PETITIONER'S NOVEMBER 14, 1997 LETTER WERE SUFFICIENT TO CONSTITUTE A CHARGE	8
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Allen-Bell v. Topolinski, 1997 WL 558019 (9th Cir.) 9

Becker v. Montgomery, 532 U.S. 757 (2001)..... 1

Bihler v. The Singer Co., 710 F. 2d 96 (3d Cir. 1983) 9

Casavantes v. California State University, 732 F. 2d 1441 (9th Cir. 1984)..... 9

Clark v. Coats & Clark, Inc., 865 F. 2d 1237 (7th Cir. 1989)..... 9

Downes v. Volkswagen of America, Inc., 41 F. 3d 1132 (7th Cir. 1993)..... 9

Early v. Bankers Life and Casualty Co., 959 F. 2d 75 (7th Cir. 1992)..... 9

Fredrickson v. United Parcel Service, 2000 WL 1599330 (9th Cir.)..... 9

Gilardi v. Schroeder, 833 F. 2d 1226 (7th Cir. 1987) 9

Laquaglia v. Rio Hotel & Casino, Inc., 186 F. 3d 1172 (9th Cir. 1999)..... 9

O'Loghlin v. County of Orange, 229 F. 3d 871 (9th Cir. 2000) 9

Philbin v. General Electric Capital Auto Lease, Inc., 929 F. 2d 321 (7th Cir. 1991)..... 9

Pijnenburg v. West Georgia Health System, 255 F. 3d 1304 (11th Cir. 2001)..... 8

Simmons v. United Airlines, 1997 WL 206026 (9th Cir.)..... 9

TABLE OF AUTHORITIES – Continued

Page

Sims v. Trus Joist MacMillan, 22 F. 3d 1059 (11th Cir. 1994) 11

Steffen v. Meridian Life Insurance Co., 859 F. 2d 534 (7th Cir. 1988)..... 9

Vargas v. Yellow Freight System, Inc., 1997 WL 413581 (9th Cir.)..... 9

Veronda v. California Dept. of Forestry, etc., 2001 WL 283122 (9th Cir. 2001)..... 9

Waiters v. Robert Bosch Corp., 683 F. 2d 89 (4th Cir. 1982)..... 6

Wilkerson v. Grinnell Corp., 2001 WL 1262325 (11th Cir. 2001) 8

Woo-Ming v. California Dept. of Corrections, 1999 WL 14295 (9th Cir.) 9

OTHER AUTHORITIES

42 U.S.C. § 2000e-5(b) 3, 5

78 Stat. 259..... 2

Supreme Court Rule 14.5 6

Supreme Court Rule 15.3 6

118 Cong. Rec. (1972)..... 4, 5, 6

Fed.R.Civ.P. 11..... 1

29 C.F.R. § 1601.12(b)..... 1, 5, 6, 7, 8

29 C.F.R. § 1601.14 5

ARGUMENT

I. 29 C.F.R. § 1601.12(b) IS VALID

(1) Respondent acknowledges that section 1601.12(b) was valid when the regulation was originally promulgated in 1966, but insists that Congress overturned the regulation when it adopted the 1972 amendments to Title VII. (R.Br. 36-37[1]; *see id.* at 20 n. 22). Respondent argues that the 1972 amendments converted the statute's requirement that a charge be verified into the *definition* of a charge, so that only a verified charge is, as a legal matter, a "charge" under Title VII. (R.Br. 16-17, 31).

Even as amended in 1972, however, the terms of section 706(b) remain directory rather than definitional. Section 706(b) now provides that a charge "shall be" under oath or affirmation, not that a charge "is" or "is defined as" a document under oath or affirmation. In this regard the language of section 706(b) is essentially the same as the language of the Rule at issue in *Becker v. Montgomery*, 532 U.S. 757, 121 S.Ct. 1801 (2001), which required that every notice of appeal "shall be signed." Fed.R.Civ.P. 11. This Court in *Becker* characterized that language as establishing a "signature requirement'," not as defining what constitutes a notice of appeal. 121 S.Ct. at 1805.

---

[1] "The regulation made sense as part of the EEOC's internal procedures in processing charges of discrimination under the original Civil Rights Act of 1964. . . . The regulation became substantively inconsistent with the statute, however, when the 1972 amendments to the Act required that all charges be 'in writing under oath or affirmation.' "

Where Congress established the definition of a term in Title VII, it did so expressly and unambiguously. Section 701, entitled "Definitions," defines the meaning of ten specific terms or phrases, generally using the verb "means." The 1972 legislation amended five definitions (those of "person," "employer," "employee," "industry affecting commerce," and "labor organization in an industry in commerce"), and added a new definition (of "religion"). In this context, the decision to reject such definitional language with regard to the oath or affirmation requirement in section 706(b) was clearly deliberate.[2]

Moreover, the 1972 legislation does not reflect any congressional decision to invalidate the then six-year-old EEOC regulation. The original oath requirement was contained in section 706(a) of the 1964 Act, which required the EEOC to notify the employer and conduct an investigation

> [w]henever it is charged under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe that a violation of this title has occurred . . . that an employer . . . has engaged in an unlawful employment practice.

78 Stat. 259. The 1972 legislation renumbered this provision as section 706(b), and reworded the relevant portions as follows:

---

[2] As we noted in our opening brief, the Senate in fact rejected a proposal by Senator Allen to *define* a charge as an allegation under oath or affirmation. (Pet. Br. 12 n. 9; see R.Br. 21).

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . within ten days, and shall make an investigation thereof. Charges shall be made in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

42 U.S.C. § 2000e-5(b).

This revision made four specific substantive changes with respect to a charge. First, the amendment permits charges to be filed under affirmation as well as under oath. Second, unlike the 1964 law, a Commissioner's charge too must be under oath (or affirmation). Third, the 1972 amendment permits a third party to file a charge on behalf of a victim of discrimination; that new form of charge also must be under oath or affirmation. Fourth, any charge must also contain such information and be in such form as the Commission may require.

The 1972 amendment moved the oath (or affirmation) requirement into a new, freestanding sentence. That change was necessary for purely syntactical reasons. The rule regarding charges grew from two words ("under oath") in the 1964 Act to approximately twenty words under the 1972 amendments, and under those amendments the lengthier requirement applied to three different types of charging parties. It would obviously have been unwieldy to repeat a twenty-word requirement after each type of charging party. Rather, the framers simply placed

the expanded requirements in a single freestanding sentence applicable to all charging parties.

The legislative history of the 1972 amendments contains no indication that Congress intended to alter the meaning of the oath requirement or to invalidate the then existing regulation. Section 706(b), like many other provisions of the 1972 law, was worked out by amendment on the floor of the Senate; when that process was completed, Senator Williams, the chief sponsor of the bill, placed in the Congressional Record an authoritative and undisputed section-by-section analysis. Far from mentioning any change in the oath requirement, that analysis stated, "The present requirement that charges must be in writing and under oath or affirmation has been retained."[3]

Respondent suggests that Congress imposed a more stringent oath requirement as a part of a compromise to obtain agreement on the amendment lengthening the charge filing period. (R.Br. 24). The section-by-section analysis, however, states to the contrary that

> [i]n establishing the new time period for the filing of charges, it is not intended that existing law, which has shown an inclination to interpret this type of time limitation to give the aggrieved person the maximum benefit of the law, should be in any way circumscribed.[4]

There is nothing in the legislative history indicating any compromise was afoot; the change in the length of the charge filing period was not in dispute, and it was not

---

[3] 118 Cong. Rec. 4941 (1972).

[4] 118 Cong. Rec. 4941 (1972).

mentioned by Senator Allen when he asked Senator Williams to include the oath or affirmation language. To the contrary, even respondent describes Senator Allen as having intended merely to "preserve" the law as it existed under the 1964 Act. (R.Br. 21).[5]

(2) Respondent apparently contends that section 1601.12(b) is inconsistent with the requirement of section 706(b) that an employer be notified[6] by the EEOC within ten days after the filing of a charge. (R.Br. 14, 15, 19, 30).[7]

---

[5] Respondent's reliance on the views of Senators Allen and Ervin regarding the meaning of the 1972 legislation seems particularly unwarranted. Both senators were longstanding, adamant opponents of civil rights legislation, and both voted against passage of the 1972 Act. 118 Cong. Rec. 4944, 7170 (1972).

[6] Respondent repeatedly asserts that Title VII requires that a copy of the charge be served on the employer. (R.Br. 13, 15, 24, 25, 34, 37). That requirement is not contained in the statute itself, which requires only that the employer be *notified* within ten days that a charge has been filed. 42 U.S.C. § 2000e-5(b) ("the commission shall serve a notice of the charge (including the date, place and circumstances of the alleged employment practice) on such employer"). EEOC regulations do require service of the charge in many circumstances. 29 C.F.R. § 1601.14.

[7] Respondent may be contending that the EEOC acted improperly in failing to provide such notice in November, 1997. Such a contention, however, is not relevant to the validity of section 1601.12(b).

It would not be incongruous for the Commission to deem the filing of an unsworn charge to be sufficient to satisfy the charge-filing deadline, but nonetheless to postpone notice under section 706(b) until a sworn (or otherwise corrected) charge was received. That is precisely the practice of this Court with regard to a timely but technically defective certiorari petition. The petition is "deemed timely" even if the corrected

But section 1601.12(b) does not address in any way *when* an employer should be notified of the filing of a charge, and assuredly does not require Commission employees to postpone notifying an employer about an unsworn charge until the charging party has submitted that charge under oath or affirmation. Nothing in section 1601.12(b) would have precluded the EEOC from notifying respondent in November 1997 that it had received petitioner's letter alleging unlawful discrimination. If the Commission acted improperly in failing to do so, such an error would affect neither the validity of section 1601.12(b) nor the sufficiency of the letter or of any other charge.[8]

Respondent objects that it would be possible under section 1601.12(b) for a charging party to wait years after the end of the 300-day charge-filing period before finally providing the required oath or affirmation. (R.Br. 38). Under section 706(b), respondent argues, an employer is entitled to notice of a charge by the 310th day[9] after the

---

petition, although promptly substituted, is submitted more than ninety days after the judgment of which the petitioner seeks review. Supreme Court Rule 14.5. In such a case the thirty-day period within which a respondent must submit any brief in opposition only runs from the date on which the case was placed on the docket. Supreme Court Rule 15.3.

[8] The section-by-section analysis placed in the Congressional Record by Senator Williams stated, "It is not intended that failure to give notice of the charge to the respondent within ten days should prejudice the rights of the aggrieved party." 118 Cong. Rec. 4941 (1972). See *Waiters v. Robert Bosch Corp.*, 683 F. 2d 89, 93 (4th Cir. 1982).

[9] That period is arrived at by adding the 300 day charge filing period to the 10 days allotted to the EEOC to notify an employer after the filing of a charge.

alleged discrimination; unreasonable delays, it fears, will postpone notice until memories have long faded. (R.Br. 34 n. 26). But if a charging party willfully refused to provide the needed oath or affirmation, the Commission would undoubtedly dismiss the charge for lack of cooperation. EEOC Compliance Manual, section 4.4(b) (2001). In the instant case, moreover, there clearly was no prejudicial delay. Petitioner signed the Form 5 twenty days after it was mailed to him, the sworn charge was filed 313 days after the original act of discrimination, and EEOC sent respondent a copy of that charge on day 319. (JA 64-66).

Finally, respondent argues that section 1601.12(b) is unnecessary because the practical problems which it addresses could be solved on a case-by-case basis since "[e]quitable tolling remains available to the courts." (R.Br. 39-41). The vast majority of Title VII charges, however, do not result in litigation. Possible subsequent "*[j]udicial* use . . . of equitable tolling" (R.Br. 40) (emphasis added) would provide no basis on which the EEOC itself could determine whether a charge, timely submitted but only later sworn, was a timely charge within the Commission's jurisdiction. It would make no sense for the Commission to dismiss such charges and compel the charging party to seek a judicial determination of the applicability of equitable tolling. Such a course of action would needlessly burden the courts, and would preclude the Commission from engaging in the investigative and conciliatory function for which it was originally created.

II. THE CONTENTS OF PETITIONER'S NOVEMBER 14, 1997 LETTER WERE SUFFICIENT TO CONSTITUTE A CHARGE

Respondent suggests that petitioner's November 14 letter, regardless of whether or when it was sworn to, was somehow insufficient to constitute a charge. (R.Br. 6-10). Respondent appears to be suggesting that this argument would provide an alternative basis for affirming the decision below.[10] This issue was not resolved by a majority of the Fourth Circuit, and would more appropriately be addressed by the court of appeals on remand.

Respondent does not question the substantive content of the November 14 letter itself. The five page single-spaced letter is far more detailed than the verified form charge that was ultimately filed. *Compare* JA 48-52 *with* JA 63. The applicable EEOC regulations, whose validity respondent does not here question, require only that a charge be "sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).[11] That standard was obviously

---

[10] The district court dismissed the complaint on this basis. (Pet. App. 22a). Contrary to respondent's suggestion (R.Br. 11 n. 12), in the court of appeals petitioner expressly argued that this aspect of the district court decision was in error. Brief for Appellant, No. 99-2408 (4th Cir.), pp. 22-24.

[11] Respondent mistakenly asserts that there is "overwhelming authority" that EEOC intake questionnaires do not constitute charges. (R. Br. 27). To the contrary, the lower courts have repeatedly held that signed intake questionnaires which contain the requisite information will, at least ordinarily, constitute charges. *Wilkerson v. Grinnell Corp.*, 2001 WL 1262325 *4-*5 (11th Cir. 2001) (explaining and distinguishing *Pijnenburg*

satisfied. The letter concluded, "I hereby file a charge of employment discrimination against Lynchburg College . . . and I call upon the EEOC to investigate this case." (JA 52-53). That was undeniably "a clear . . . request for EEOC to act." EEOC Compliance Manual, § 2.2 (2001).[12]

Respondent objects that after filing the letter petitioner did not "procee[d] as if [he] regarded that letter to be a 'charge.' " (R.Br. 9). The meaning of this assertion is unclear. If the letter itself constituted a Title VII charge

---

v. West Georgia Health System, 255 F. 3d 1304 (11th Cir. 2001)); *Veronda v. California Dept. of Forestry, etc.*, 2001 WL 283122 *2 (9th Cir. 2001) (intake questionnaire filed with state agency sufficient); *Fredrickson v. United Parcel Service*, 2000 WL 1599330 (9th Cir.); *O'Loghlin v. County of Orange*, 229 F. 3d 871, 873 (9th Cir. 2000); *Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F. 3d 1172, 1175 (9th Cir. 1999); *Woo-Ming v. California Dept. of Corrections*, 1999 WL 14295 *1 (9th Cir.); *Allen-Bell v. Topolinski*, 1997 WL 558019 *1 (9th Cir.); *Vargas v. Yellow Freight System, Inc.*, 1997 WL 413581 *2 (9th Cir.); *Simmons v. United Airlines*, 1997 WL 206026 *1 (9th Cir.); *Downes v. Volkswagen of America, Inc.*, 41 F. 3d 1132, 1137-38 (7th Cir. 1993); *Early v. Bankers Life and Casualty Co.*, 959 F. 2d 75 (7th Cir. 1992); *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F. 2d 321, 324 (7th Cir. 1991); *Clark v. Coats & Clark, Inc.*, 865 F. 2d 1237, 1239-41 (7th Cir. 1989); *Steffen v. Meridian Life Insurance Co.*, 859 F. 2d 534, 542-43 (7th Cir. 1988); *Gilardi v. Schroeder*, 833 F. 2d 1226, 1230-31 (7th Cir. 1987); *Casavantes v. California State University*, 732 F. 2d 1441 (9th Cir. 1984).

[12] See *Downes v. Volkswagen of America, Inc.*, 41 F. 3d 1132, 1138 (7th Cir. 1993); (*Bihler v. The Singer Co.*, 710 F. 2d 96, 99 (3d Cir. 1983) ("notice to the EEOC must be of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act's machinery.")

when it was initially filed on November 14, 1997, petitioner's subsequent conduct could not have altered the nature or sufficiency of that earlier document.[13] In a separate letter petitioner's counsel advised the EEOC that he understood that the filing of the letter constituted the filing of a charge under section 706(b). (JA 54). Nothing thereafter done by petitioner or his counsel was inconsistent with that express understanding.

Finally, respondent argues that the EEOC did not proceed "as if they regarded that letter to be a 'charge.' " (R.Br. 9). But two Commission officials from the office in question submitted affidavits asserting that the letter was (or would in the normal course of business have been) sufficient to constitute and be treated as a charge. (JA 78-82). Several of the EEOC's actions reflected an understanding that the filing of the letter had constituted the filing of a charge. If the Commission had understood otherwise, it presumably would have responded to the

---

[13] Petitioner's counsel asked the Commission to defer serving the charging documents on the employer until petitioner had been interviewed. (JA 54). This request confirms that petitioner's counsel regarded the letter as a charge. There would have been no reason to ask the Commission to delay *any* action unless petitioner and his attorney understood that the letter itself had constituted a charge, because the Commission would have had no occasion to act until and unless a charge had been filed. The letter itself did not constitute a request that the EEOC postpone complying with the requirement of section 706(b) that the Commission provide *notice* to the employer that a charge had been filed. The letter did not mention that notice, and it would have been entirely possible for Commission employees to interview petitioner by phone prior to the expiration of that ten day period. Both letters to the Commission contained the needed telephone numbers. (JA 53, 55).

letter from petitioner's counsel which expressly asked if further action was required of petitioner in order to meet the filing deadline. Had the Commission not regarded the filing deadline as having already been met, a belief which presumed that the letter was itself a charge, it would have acted with far greater dispatch when it prepared the Form 5, and would have warned petitioner of an impending deadline when it sent him the Form 5 on the 285th day after the alleged discriminatory act. In any event, if the November 14 letter was indeed a charge when it was filed, nothing done thereafter by Commission employees could have altered its status. "Title VII 'does not condition an individual's right to sue upon the EEOC's performance of its administrative duties.' " *Sims v. Trus Joist MacMillan*, 22 F. 3d 1059, 1063 (11th Cir. 1994) (*quoting Jefferson v. Peerless Pumps Hydrodynamic, Div. of FMC Corp.*, 456 F. 2d 1359, 1361 (9th Cir. 1972)).

CONCLUSION

For the above reasons, the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

ERIC SCHNAPPER*
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

ELAINE CHARLSON BREDEHOFT
CHARLSON BREDEHOFT, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, VA 20190
(703) 318-6800

KRISTINE H. SMITH
EDMUNDS & WILLIAMS, P.C.
800 Main Street
Suite 400
Post Office Box 958
Lynchburg, VA 24505
(804) 846-9000

Counsel for Petitioner

**Counsel of Record*